No. 80-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ENVIRONMENTAL DEFENSE FUND INC.
Petitioner

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE SUBMITTED IN SUPPORT OF PETITIONER ENVIRONMENTAL DEFENSE FUND

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding that the term "person adversely affected" in Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act has distinct and different meanings in parallel sections of the Act, so as to restrict hearing rights only to those with an economic interest in the continued registration of a pesticide?

Amici Curiae

The undersigned counsel for the following listed parties, non-profit environmental, consumer, farm worker, labor, and health organizations with an aggregate membership number in the millions and who are amici curiae in support of the position of petitioner Environmental Defense Fund, certifies that they have an interest in the outcome of this case:

American Public Health Association
California Rural Legal Assistance
Concern, Inc.
Consumers Union of the United States, Inc.
Environmental Action
Friends of the Earth
The Equal Justice Foundation
The Izaak Walton League
The Migrant Legal Action Program, Inc.
The National Audubon Society
The National Consumers League
The National Wildlife Federation
The Natural Resources Defense Council
The Oil Chemical and Atomic Workers International Union
The Sierra Club
The Wilderness Society

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STATEMENT OF THE CASE

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") — the key statute for controlling hazardous pesticides — guarantees a hearing to persons "adversely affected" by a notice of the Administrator of EPA proposing modifications in the registration of a pesticide.

On February 13, 1979, the Administrator issued a notice, under Section 6(b)(1) of FIFRA, announcing that continued use of the pesticide chlorobenzilate under existing registration criteria "posed unreasonable risks to man and the environment." The notice stated the Administrator's intention to cancel the registration for several minor uses of chlorobenzilate. Because chlorobenzilate allegedly controls citrus rust mite, however, the notice also permitted the continuation of the registration for citrus — the

pesticide's *major* use — subject to certain new restrictions ostensibly designed to reduce the risks of such use.

The Environmental Defense Fund ("EDF") timely challenged the Administrator's proposal on the ground that the proposed restrictions still would not adequately protect farm workers and the public from the known serious risks posed by exposure to chlorobenzilate. Studies have shown that chlorobenzilate is carcinogenic in experimental animals. This is significant because: a) chlorobenzilate is applied from the air, and hence may drift from citrus groves to nearby residential areas; and b) citrus pulp and rind, which are contaminated with chlorobenzilate residues, are fed to dairy cattle, and hence the pesticide may enter the human food chain through milk. In addition, there is evidence that chlorobenzilate causes testicular atrophy and could therefore produce impotence in farm workers applying it. Finally, EDF is aware that safer alternatives are being developed.

FIFRA provides that a §6(b)(1) notice:

> ... shall be sent to the registrant and made public. The proposed action shall become final and effective ... unless ... *a request for a hearing is made by a person adversely affected by the notice.* (Emphasis supplied.)

Accordingly EDF requested an administrative hearing to show the inadequacy of the proposed restrictions, and to propose that chlorobenzilate be phased out during a five-year period as substitutes become available.

The Administrator of EPA denied EDF's request for a hearing. He reasoned that EDF could not be "adversely affected" by the cancellation decision because the category of persons "adversely affected" includes only those with *economic* interests affected by additional restrictions on a pesticide's use — *i.e.*, manufacturers and users. He also concluded that, even if EDF were to prove the inadequacy

of the proposed restrictions at a hearing, EPA could not impose more stringent safeguards on the use of the pesticide than those proposed in the original notice.

EDF appealed to the United States Court of Appeals for the District of Columbia Circuit, and a panel[1] of that Court affirmed the Administrator's decision, albeit with different reasoning than had been offered by EPA's Administrator.[2] The Court held that a Section 6(b)(1) notice is severable, and that only persons adversely affected by the *cancellation* portion of the notice have a right to a hearing. By contrast, the portion of the notice permitting continued use, even *when the terms of use are changed by new restictions*, was held merely to continue the status quo and therefore not properly to be the subject of a Section 6(b)(1) hearing.

After this decision, and the denial of a petition for a rehearing *en banc*, EDF petitioned for a writ of certiorari.

ARGUMENT

This case is critically important: it concerns the public's statutory right to enter the formal EPA process that imposes safeguards on the use of otherwise hazardous pesticides. Under the Court of Appeal's decision, only those may obtain a hearing who claim an economic interest in reducing or eliminating new restrictions on pesticide use. This result is at odds with the clear intent of Congress' 1972 amendments to FIFRA, which were meant to protect man

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[1]Judge Wilkey filed an opinion joined by Judge McGowan and Judge Davies, Senior U.S. District Judge for the District of North Dakota, sitting by designation.

[2]The Agency defended itself throughout the Court proceedings. The Justice Department took the unusual step of withdrawing from the case after having determined through independent analysis that it believed the Agency's legal position incorrect.

and the environment against unreasonable adverse effects of pesticide use.

The decision reaches far beyond the problem of chlorobenzilate: it prevents any effective — *i.e.*, formal administrative — challenge to the adequacy of every future EPA proposal to restrict the use of an unacceptably dangerous pesticide. The decision does not permit workers and consumers to participate effectively in the dialogue about adequate controls on pesticide use except by suit in district court on a theory that the Administrator has acted arbitrarily and capriciously by not imposing stronger restrictions — a high hurdle that has no foundation in Congressional intent.

1. The Circuit Court Erred by Interpreting "Adversely Affected" in Section 6 Differently From the Same Language in Section 16.

Under Section 16 of FIFRA, 7 U.S.C. §136 n(b), a party "adversely affected" by an order of the Administrator regarding a pesticide, made after a public hearing, may obtain circuit court review of the order. It is uncontested that workers, consumers, and environmental groups are parties "adversely affected" within the meaning of Section 16. *See In re Environmental Defense Fund, et al.*, FIFRA Docket No. 411, *et al.*, at 16, 21; H. Rep. No. 92-1540 92nd Cong., 2d Sess. at 33 (1972); *EDF v. Hardin*, 138 U.S. App. D.C. 391, 394-95, 428 F. 2d 1093, 1096 (1970) (construing Section 4(d) in 1964 FIFRA amendments, the precursor to Section 16).

The Court of Appeals assumed without discussion that the term "adversely affected" has one meaning for purposes of appellate review under Section 16, and a radically different meaning for purposes of administrative review under Section 6, 7 U.S.C. §136 d(b). This arbitrary and unsupportable conclusion must be rejected. The "adversely affected" language of Section 16 and 6 of FIFRA is identi-

cal. Unless there is good reason to do otherwise, it should be identically interpreted in light of the familiar rule of statutory construction that:

> . . . in the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same way throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere . . . *Schooler v. U.S.*, 231 F.2d 560, 563 (8th Cir., 1956) (quoting 82 CJS, Statutes, Section 348).

Accord, United States v. Gertz, 249 F.2d 662, 665 (9th Cir., 1957). *See United States v. Cooper Corp.*, 312 U.S. 600, 606-07 (1941); *Cooke v. Board of Education*, 82 U.S. App. D.C. 117, 118, 161 F.2d 872, 878 (1947). The Circuit Court ignored this presumption and, without adducing reasons, treated the symmetrical terms in Section 6 and 16 dissimilarly.

2. When Congress Added Section 6 in 1972 It Understood the Term "Adversely Affected" to Include the Public Such as Amici.

We need not deal here only with presumptions. Congressional intent clearly includes the public such as amici in the group "adversely affected" by a notice under Section 6 of FIFRA.

The origin of the "adversely affected" language in Section 6(b)(1) can be traced to the 1964 amendment to FIFRA which inserted Section 4(d), guaranteeing judicial review of pesticide regulatory decisions to "any person who will be adversely affected by such order . . ." 7 U.S.C. Section 135b(d) (1964). In ruling that petitioner EDF was "adversely affected" under Section 4(d), the Court of Appeals, in *EDF v. Hardin*, 138 U.S. App. D.C. 391, 394-395, 428 F.2d 1093,

1096 (1970), clarified the meaning of those words:

> The statute affords a right of review to "any person who will be adversely affected" by an order. [7 U.S.C. 135b(d) (1964).] . . . The "zone of interests" sought to be protected by the statute includes not only the economic interest of the registrant but also the interest of the public in safety.

The Court continued:

> Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit. The interest asserted in such a challenge to administrative action need not be economic. 428 F.2d at 1097.

Thus, as of 1970, the term "adversely affected" in FIFRA Section4(d) included the public like amici, as well as those with an economic interest in a pesticide.

In 1972, FIFRA was comprehensively revised in the Federal Environmental Pesticide Control Act. P.L. 92-516, 86 Stat. 973. The 1972 amendments picked up the "adversely affected" language, both in Section 6(b) and Section 16. The legislative history leaves no doubt that Congress intended the meaning of "adversely affected" persons in the 1972 amendments to remain unchanged from prior law. The House version of the amendments proposed to change the "adversely affected" language in the judicial review section to "any party at interest." H. Rep. No. 92-511, 92d Cong., 1st Sess. 62 (1972). [Hereinafter "House Report."] The Senate Agriculture and Forestry Committee "rejected the House language which refers to 'interested persons' so as to avoid any implication of desiring to change present law." S. Rep. 92-838, 92d Cong., 2d Sess. 12 (1972). As established in *EDF v. Hardin, supra*, "present law" in 1972 included consumers, farm workers, environmentalists, and others concerned

about the safety of a pesticide within the definition of persons "adversely affected" by a pesticide cancellation or suspension decision.[3] [4]

Senator Hart, one of the principal figures in fashioning

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[3]The House bill was sharply criticized by several members, both within the House Agriculture Committee and during the Floor debate, for excluding environmental and public interest groups from judicial review by using the "any party at interest" language. *See* House Report, at 69-70 (Additional Views of Congressman Thomas S. Foley); House Report, at 72-73 (Additional Views of Hon. John G. Dow); 117 *Cong. Rec.* 39977 (1971) (remarks of Rep. Dow); 117 *Cong. Rec.* 40034 (1971) (Remarks of Rep. Dow); 117 *Cong. Rec.* 40036 (1971) (Remarks of Rep. Harrington); 117 *Cong. Rec.* 40036 (1971) (remarks of Rep. Abzug); 117 *Cong. Rec.* 40062 (1971) (remarks of Rep. Dow). These Congressmen obviously considered that the alternative "adversely affected persons" language included groups like amici.

[4]This interpretation of the phrase is further supported by the statement concerning judicial review in the Conference Report that "[t]he conferees intend the words "adversely affected" to have the same meaning that they have under 5 U.S.C. 702 [the Administrative Procedure Act]." H. Rep. No. 92-1540, 92d Cong., 2d Sess. 33 (1972). The requirements for standing under the APA have not changed significantly since 1972. According to the controlling case law, a plaintiff is adversely affected under 5 U.S.C. Section 702 and has standing to challenge an administrative action in federal court if there has been "injury in fact," and "the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." Sierra Club v. Morton, 405 U.S. 727, 733 (1972); Barlow v. Collins, 397 U.S. 150 (1970); Ass'n of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970); Gifford-Hill & Co. v. FTC, 173 U.S. App. D.C. 135, 523 F.2d 730 (1975). As previously noted, the D.C. Circuit's decision in EDF v. Hardin, *supra*, established that the interest of the public in the safety of pesticides is within the zone of interests protected by FIFRA. By preserving the "adversely affected" language and rejecting the "any party at interest" language of the House version, the Conference Committee clearly intended that standing to seek administrative review of pesticide decisions should not be limited to those with purely economic interests at stake.

the legislation, summarized the intent of Congress by saying of the 1972 amendments:

> *The bill takes important strides in* the control of the use of pesticides, the regulation of intrastate shipments and sale of pesticides, control of exports of pesticides which may inflict unreasonable harm on the environment, the protection of farmworkers from involuntary risks, and *the promotion of citizen participation in the regulatory process through comment before administrative agencies* and litigation in the courts. 118 Cong. Rec. 32259 (1972). (Emphasis added.)

This intent to grant citizens the right to enter the administrative process — palpable at point after point in the legislative history, *see, e.g.*, Remarks of Rep. Dow, House Report at 73; Remarks of Rep. Vanik, 117 *Cong. Rec.* 40048 (1971); S. Rep. No. 92-838 (Part II), 92d Cong., 1st Sess. 39 (1972) — was ignored in the Circuit Court's decision. This Court, reviewing that decision, should put the people back in the process, as their representatives plainly intended.

3. Impracticability of the Decision Below

We have seen that Congress intended the public to have a right to play a formal role in the regulation of pesticides.[5] The Circuit Court's decision permits participation only through an unwieldy device — review under the arbitrary and capricious standard in the district court, under Section

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[5]EPA does allow the public to submit comments in its administratively created "Rebuttable Presumption Against Registration" process which precedes the statutory hearing process. 40 C.F.R. §162.11 (1980). However, Congress clearly intended to give the members of the public a right to participate in the *formal* hearing process that follows the issuance of a notice of intent to cancel the registration of a pesticide. Written comments, especially when restricted to early in the regulatory process, are simply not an effective mechanism for challenging complex technical factual determinations about the risks and benefits of pesticide use.

16 of FIFRA, of decisions not to restrict use. After what is certain to be an expensive and lengthy evidentiary hearing[6] in district court, an appeal can be anticipated, and after that, if the citizen group is successful, remand to the EPA for another round of repetitious administrative hearings and review. This circuitous path to citizen participation in the regulation of potentially dangerous pesticides is so fraught with practical and legal obstacles that it makes effective citizen participation virtually impossible. We submit that the erection of such obstacles, unintended by Congress, should not be permitted to block a statutory right of citizens to challenge the adequacy of EPA's pesticide regulation decision directly in administrative hearings. As a matter of fundamental fairness, those who believe a proposed EPA decision on a pesticide's use is not protective enough of health and the environment should have the same right to make their case in an agency hearing as those who believe that the EPA decision goes too far in restricting the pesticide's use.[7]

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[6]Pesticide cancellation hearings before the Agency, such as those involving DDT, aldrin/dieldren, chlordane/heptachlor, mirex, and 2,4,5-T provide evidence of just how burdensome such a task would be for amici. Those hearings have lasted years, and involved scores if not hundreds of witnesses. To undertake such an effort once, in district court, would pose enormous practical difficulties for amici. To repeat the process, if successful in court, before the Agency in a hearing would be financially impossible.

[7]The requirement that labor, environmental and consumer organizations make their case in district court as a prerequisite to making the identical evidentiary showing in an agency proceeding also places a substantial burden on the district courts. Of necessity, the district courts will have to conduct detailed factual hearings in order to determine whether the issues involved should be sent back to the Environmental Protection Agency for similar hearings under the statute. This procedure is wasteful of judicial time and resources and is wholly unnecessary. FIFRA provides for an adjudicatory hearing at the agency to consider the very issues EDF sought to raise in the chlorobenzilate case. The Court of Appeals' decision

CONCLUSION

Citizen participation in the pesticide regulatory process was a central aim of Congress when it amended FIFRA in 1972. Not only economic, but also health and environmental concerns were meant to inform that process. The decision below restricts entry into the formal regulatory dialogue to those with an economic interest. Not only is this result wrong in principle, but, ironically, led in the present case to a probably erroneous conclusion regarding the relative costs and benefits of the use of chlorobenzilate.[8]

For all of these reasons, we urge this Court to grant a

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forecloses that forum and imposes the burden of hearing the case first on the district courts. Thereafter, if plaintiffs are successful both there and in the court of appeals the same hearing will be repeated at the EPA. This procedure creates a whole new track for pesticide cancellation decisions, which until now have involved only agency hearings followed by court of appeals review. In the future the pattern will involve an administrative hearing and appellate review for pesticide manufacturers and users paralleled by simultaneous efforts by citizens groups interested in the same agency decision first in district court, then in the appellate court, then, if successful, in an agency hearing, followed by appellate review again.

[8]For example, EPA could have considered in a section 6(b)(1) hearing a recent report, not examined in the informal Rebuttable Presumption Against Registration process, prepared by the National Research Council of the National Academy of Sciences, entitled *Regulating Pesticides*. The report concludes that the economic benefits of chlorobenzilate use on citrus are "far less than" the estimates EPA relied on in deciding to continue the registration for citrus use.

writ of certiorari so that it can rectify the Circuit Court's serious error, and indicate the right of citizens to participate as fully as pesticide manufacturers and users in EPA's pesticide regulation decisions.

Respectfully submitted,

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